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IN THE

Supreme Court of the United States

October Term, 1968

No. 720

CHARLES CACI, also known as, BOBBY MILANO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PAUL IVAN BIRZON,
Attorney for Petitioner, Charles Caci, a/k/a Bobby Milano,
605 Brisbane Building,
Buffalo, New York 14203.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

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CHARLES CACI, also known as, BOBBY MILANO,
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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CHARLES CACI, also known as, BOBBY MILANO, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this proceeding on July 30, 1968.[1]

Opinion Below

The opinion of the Court of Appeals for the Second Circuit is reprinted at page 18, *infra* of the Appendix hereto.

[1] United States of America vs. Charles Caci, also known as, Bobby Milano; Stephen A. Cino; Pasquale A. Natarelli, also known as, Pat Natarelli; Frederico G. Randaccio and Louis Sorgi.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered July 30, 1968. The Petition for a rehearing was denied on October 8, 1968. The jurisdiction of this court is invoked under 28 U. S. C. section 1254 (1).

Questions Presented

I. Whether the conduct alleged under Count I of the Indictment is within the scope of the Federal legislative control intended in 18 U. S. C. 1951, the so-called "Hobbs Act."

II. Whether the requirements of "substantial due process" were violated by allowing a conviction under Count II of the Indictment to rest upon proof which utterly failed to demonstrate that the petitioner Charles Caci, also known as, Bobby Milano possessed the necessary *mens rea.*

III. Whether the court committed substantial error by refusing to charge the jury with respect to an alibi defense as submitted by counsel for the petitioner Frederico G. Randaccio.

IV. Whether the decision of the Second Circuit Court of Appeals on the issue of the selection of Federal jurors in the Western District of New York is a departure from the decisions of the United States Supreme Court and is in conflict with the policy of establishing uniform standards in selecting Federal jurors.

Statutory Provisions Involved

The statutory provisions involved are 18 U. S. C. section 1951; 18 U. S. C. section 371, and 18 U. S. C. section 2314. They are printed in Appendix A, *infra,* pp. 12-15.

Statement

In a two-count Indictment, the petitioner, CHARLES CACI, also known as, BOBBY MILANO, was accused of violating Title 18 U. S. C. 1951 (Anti-Racketeering Statute, commonly known as the Hobbs Act) alleging that he and others conspired to obstruct interstate commerce by robbery, and violation of 18 U. S. C. 371 (the General Conspiracy Statute), alleging that he and others conspired to transport in interstate commerce "goods, wares, merchandise, securities and money of the value of Five Thousand ($5,000.00) Dollars or more knowing the same to be stolen" in violation of Title 18 U. S. C. section 2314. Following an approximately four (4) week trial by jury, the petitioner CHARLES CACI, also known as, BOBBY MILANO, together with four (4) co-defendants was found guilty under both counts.

On December 11, 1967 the Hon. John O. Henderson, the United States District Judge for the Western District of New York, sentenced the petitioner CHARLES CACI, also known as, BOBBY MILANO, to a term of ten (10) years imprisonment on the first count and five (5) years imprisonment on the second count, both terms to run concurrently.

The case was appealed to the Court of Appeals for the Second Circuit, which court affirmed the conviction in an Opinion decided July 30, 1968. A Petition for a Re-Hearing was filed, which was subsequently denied on October 8, 1968.

Reasons for Granting the Writ

I.

The instant conviction raises an important question concerning the intended scope of a Federal statutory provi-

sion, namely, section 1951 of Title 18 United States Code, the so-called "Hobbs Act".

The Supreme Court has never addressed itself to the question of whether the conduct upon which the present conviction is based is within the Federal legislative control intended in the "Hobbs Act."

The applicability to analogous situations presently within the sole jurisdiction of the States, and the potential extensions and ramifications which are latent within the principle upon which this conviction rests is of such broad consequence as to warrant a final determination by the Supreme Court.

Simply stated, the first count of the Indictment charges a conspiracy to obstruct, delay and effect commerce by robbery of money and property belonging to and in the care of Armored Transport of Los Angeles, Inc. This count is based on alleged violation of 18 U. S. C. section 1951 (the pertinent provisions of which are reprinted in Appendix A, p. 12) popularly known as the "Hobbs Act."

That the "Hobbs Act" was not intended to be all pervasive is indicated by the fact that section (c) of section 1951 exempts certain statutes from its reach.

Furthermore, the "Hobbs Act" was passed in 1946 following the decision of the United States Supreme Court in *United States v. Local 807,* 315 U. S. 521, 62 S. Ct. 642, wherein the court had occasion to interpret section 2 of the Federal Anti-Racketeering Act of 1934, 48 Stat. 979,[2] the predecessor to the "Hobbs Act."

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[2] "Any person who, in connection with or in relation to any acts in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

(Footnote continued on following page)

In the *Local 807* case, the Supreme Court held that the exception provided in section (a) of section 2 covered efforts by members of a truck drivers' union to exact wages by violence from non-union truck owners driving trucks to their destination.

The "Hobbs Act" accomplished its narrow design by eliminating the exclusion clause involved in the *Local 807* case.

The legislative history of the "Hobbs Act" makes clear that the Congress, in considering an amendment to the Anti-Racketeering Act, contemplated the elimination of a specific evil, that is, the "use of robbery and extortion under the guise of obtaining wages and the obstruction of interstate commerce." 91 Congressional Record 11,900.

There is absolutely nothing in the legislative history of the "Hobbs Act" to suggest that the Congress, by including the term "robbery" in the amendment to the Anti-Racketeering Act, which itself made no express reference to that term, intended to assume if not pre-empt the responsibility and indeed the right of the States to enforce its own laws against the ancient, common law crime of robbery.

It is perhaps significant that the "Hobbs Act" remained within Chapter 95 of Title 18 which is entitled "Racketeering" as opposed to being included in Chapter 103 of Title

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(Footnote continued from preceding page)

"(a) obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence or coercion, for the payment of money or other valuable considerations for purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or

"(b) obtains the property of another, with his consent, induced by wrongful use or force or fear, under color of official right;

"(c) commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate subsections (a) or (b):"

18 which concerns exclusively with acts involving robbery and burglary which constitute crimes against the United States.

The "Hobbs Act" was special purpose legislation seeking to address specific mischief, *U. S. v. Green,* 350 U. S. 415, 76 S. Ct. 522. That the spirit and intent of the use of the term "robbery" was especially designed to proscribe the robbery on the highways which the Supreme Court exempted from the reach of the Anti-Racketeering Act of 1934 in the *Local 807* case.

The Congressional debate literally teems with expressions which support this construction of the act. One illustration will suffice for present purposes.

> "Mr. Cox: . . . the sole purpose of the Bill which the pending rule is intended to make in order is to undue the outrageous opinion of the Supreme Court in the Teamsters Union Case, where that case legitimatized highway robbery when committed by a labor goon". 91 Cong. Rec. 11841 (1945).

In addition, there are several references by the author of the Bill to the effect that the proscription against robbery contemplated a robbery committed in a particular fashion, namely, the highway robbery variety. 91 Cong. Rec. 11901, 11914 (1945).

During the twelve year life span of the Anti-Racketeering Act of 1954, there is not a single reported case to disclose a prosecution for the kind of acts made the subject of the instant indictment.

Indeed in the single instance of a reported case involving a conviction for a "Hobbs Act" violation based upon circumstances amounting to robbery, the facts disclose the "highway" character of the robbery, thus clearly bringing

it within the intendment of the Act. *U. S. v. DeSisto,* 329 F. 2d 929.

Other than this innovation represented by the "Hobbs Act" proscription against "highway robbery," the predominant theme is much like that which pervaded its ancestral legislation, namely, the prevention of extortionate conduct affecting interstate commerce. Consequently, the element of extortion is to be found in almost every case decided under the Hobbs Act.[3]

There is no significant difference between the facts of the case at bar and the most commonplace robbery which occurs on the streets of our cities any number of times every day of the year.[4]

The fact that the point of origination of the alleged conspiracy was in Buffalo, New York and a substantive crime was to be committed in the State of California is wholly immaterial since it is the adverse effect upon commerce which is the gravamen.

Thus, for the above reasons the court should determine whether or not the conduct upon which the present conviction rests is within the Federal legislative control intended in the "Hobbs Act."

II.

The court should consider whether the requirements of "substantial due process" were violated by allowing

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[3] See *e.g., Stirone v. United States,* 361 U. S. 212, 80 S. Ct. 270; *Carbo v. U. S.,* 314 F. 2d 718 (C. A. Cal. 1963), cert. den. 377 U. S. 953, 84 S. Ct. 1625, reh. den. 377 U. S. 1010, 84 S. Ct. 1902, and *U. S. v. Provenzano,* 334 F. 2d 678 (3rd Cir. 1964), cert. den. 379 U. S. 947, 85 S. Ct. 440.

[4] "During calendar year 1966, there were 153,420 robberies committed in the United States, a substantial increase over the 134,680 estimated offenses recorded in this classification in 1965. * * * There were an average of 420 robberies every day in 1966." Uniform Crime Reports for the United States—1966, issued by John Edgar Hoover, Director of the Federal Bureau of Investigation.

a conviction under Count Two of the Indictment to rest upon proof which utterly failed to demonstrate that the petitioner Charles Caci, also known as, Bobby Milano possessed the necessary *mens rea.*

Count II of the instant indictment charges all of the co-conspirators with a violation of section 371 of Title 18, United States Code. The latter section provides in pertinent part:

> "whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000.00 or more, knowing the same to have been stolen, converted or taken by fraud; * * *"

The record is entirely barren of any evidentiary suggestion that the petitioner Caci was aware that the jewelry and money alleged to be the subject of the conspiracy under the second count of the Indictment was to be transported into interstate commerce. The single reference to the ultimate disposition of the property after the consummation of the proposed robbery is to be found in the testimony of Pascal Calabrese when he refers to the conversations at the February 5, 1965 meeting at Natarelli's home in Buffalo, New York, at which Caci was not present. It was there that Calabrese was allegedly advised that the jewelry was to be given to Cino who was to deliver it to his uncle in San Francisco, California, the same to be fenced and the money delivered to Buffalo, New York. There is absolutely no indication that defendant Caci was apprised of this aspect of the conspiracy. Viewing the evidence in a light most favorable to the Government, together with all reasonable inferences which might be drawn therefrom, *Glasser v. U. S.*, 315 U. S. 60, 80, 62 S. Ct. 457, on this record it cannot be said that Caci's knowledge extended beyond the fact that there was to be a proposed robbery.

It is axiomatic that a conviction for conspiracy requires evidence of the same intent or knowledge as to convict one charge with the substantive offense made the object of the conspiracy. *Ingram v. U. S.*, 360 U. S. 672, 79 S. Ct. 1314. The two principal ingredients of Title 18 U. S. C. 2314 is (1) the transporation in interstate commerce of (2) stolen goods or money knowing the same to have been stolen.

In *United States v. Crimmens,* 123 F. 2d 271 the defendant was charged with conspiring to transport stolen securities and interstate commerce. The record was bereft of any proof that the defendant knew that his confederates were bringing stolen bonds into the state. The Court reversed judgment of conviction and held that there could be no conspiracy to cause stolen securities to be transported into interstate commerce unless it is understood by the conspirators to be part of the venture that the securities cross state lines.

> "Ordinarily one is not guilty of a crime unless he is aware of the existence of all those facts which make his conduct criminal" *U. S. v. Crimmens, supra,* at 272.

Nor can it be said that it was an implied term of the agreement that the proceeds from the proposed robberies be transported across state lines from California to Buffalo. *U. S. v. Crimmens, supra* at 273.

In *United States v. Sherman,* 171 F. 2d 619, on a record not dissimilar to that which confronts this Court in terms of the question of Caci's knowledge, the Court held that in a prosecution for conspiracy to steal, carry away and conceal goods while moving in foreign commerce, the evidence must demonstrate the defendant's knowledge that the goods were stolen from foreign commerce.

In *Nassif v. U. S.*, 370 F. 2d 147, 153 a case involving an alleged violation of Title 18 U. S. C. 371, the Court states that knowledge of the interstate character of goods allegedly converted out of interstate commerce constituted a prerequisite of proof. Nor does it suffice to assert that the law does not require knowledge of all the details of the conspiracy, *Bloomenthal v. U. S.*, 332 U. S. 539, 68 S. Ct. 248 since the fact of proposed transportation of the stolen money and goods into interstate commerce was an essential ingredient of a substantive crime and not a mere detail. In sum, it is clear that Caci did not have sufficient knowledge to conspire to commit a Federal offense; and to sustain a conviction under Count II of the Indictment is violative of substantial due process.

III.

The petitioner Caci joins in the reasons relied upon for granting the Writ as submitted in behalf of the petitioner Frederico G. Randaccio relating to the court's refusal to instruct the jury with respect to an alibi defense. (Petition for a Writ of Certiorari submitted in behalf of Frederico G. Randaccio).

It was clear that other counsel also relied in part upon the alibi defense to be offered by Randaccio (R. 575, 2078). Therefore, said reasons are consequently incorporated herein by reference.

IV.

The petitioner Caci joins in the reasons relied upon for granting the Writ as submitted in behalf of the petitioner Randaccio relating to the issue of whether or not the selection of Federal jurors in the Western District of New York

is a departure of the decisions of the United States Supreme Court and is in conflict with the policy of establishing uniform standards in selecting Federal jurors. (Petition for a Writ of Certiorari submitted in behalf of Frederico G. Randaccio).

Therefore, said reasons are consequently incorporated herein by reference.

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari to review the judgment and opinion of the Second Circuit Court of Appeals should be granted.

Respectfully submitted,

PAUL IVAN BIRZON,
Attorney for Petitioner
Charles Caci, also known as,
Bobby Milano,
605 Brisbane Building,
Buffalo, New York 14203.

APPENDIX "A"

Statutes

CHAPTER 95—RACKETEERING

Sec.
1951. Interference with commerce by threats or violence.

§ 1951. INTERFERENCE WITH COMMERCE BY THREATS OR VIOLENCE

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or propert in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45. June 25, 1948, c. 645, 62 Stat. 793.

"Any person who, in connection with or in relation to any acts in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

"(a) obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence or coercion, for the payment of money or other valuable considerations for purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or

"(b) obtains the property of another, with his consent, induced by wrongful use or force or fear, under color of official right;

"(c) commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate subsections (a) or (b);"

§ 371. Conspiracy to Commit Offense or to Defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any

purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

18 § 2314 CRIMES AND CRIMINAL PROCEDURE

Note ½

§ 2314. Transportation of stolen goods, securities, moneys, fraudulent, State tax stamps, or articles used in counterfeiting

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altering, or counterfeiting any security, or tax stamps, or the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security, or tax stamps, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country. As amended July 9, 1956, c. 519, 70 Stat. 507; Oct. 4, 1961, Pub. L. 87—371, § 2—75 Stat. 802.

1961 AMENDMENT. Pub. L. 87-371 inserted "or tax stamps" following "securities" in the third paragraph and following "security" in the fourth paragraph, and "fraudulent State tax stamps," in the catchline.

1956 AMENDMENT. Act July 9, 1956, amended section by inserting after first par., paragraph relating to interstate transportation of persons in schemes to defraud.

LEGISLATIVE HISTORY: For legislative history and purpose of Act July 9, 1956, see 1956 U. S. Code Cong. and Adm. News, p. 3036 See, also, Pub. L. 87-371, 1961 U. S. Code Cong. and Adm. News, p. 3264.

APPENDIX "B"

Opinions and Judgments Below

[2820] JUDGMENT AND COMMITMENT.

UNITED STATES DISTRICT COURT

FOR THE

WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

CHARLES CACI, a/k/a BOBBY MILANO.

Indictment No. Cr-1967-115.

On this 11th day of December, 1967 came the attorney for the government and the defendant appeared in person and with counsel.

IT IS ADJUDGED that the defendant upon a verdict of guilty on November 21, 1967, has been convicted of the offense of unlawfully and wilfully conspiring to obstruct and delay commerce and the movement of money and property in commerce by robbery, in violation of Section 1951, Title 18, U. S. C., (Ct. 1); unlawfully and wilfully conspiring to transport or cause to be transported in interstate commerce goods, money, etc. in excess of ($5,000.00), knowingly the same to have been stolen, in violation of Section 371, Title 18, U. S. C., (Ct. 2).

in Counts One and Two

as charged

and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary, being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Count One-Ten (10) years in an institution designated by the Attorney General.

Count Two-Five (5) years in an institution designated by the Attorney General. Sentence on Count Two to run concurrent with sentence imposed on Count One.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

JOHN O. HENDERSON,
United States District Judge.

ROLAND E. LOGEL,
Clerk.

A True Copy. Certified this 13th day of December 1967.

(Signed) ROLAND E. LOGEL,
Clerk.

(By) ALICE MANNING,
Deputy Clerk.

Approved: JOHN T. CURTIN,
U. S. Attorney.

By ANDREW F. PHELAN,
Assistant U. S. Attorney.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 511—September Term, 1967.
(Argued June 18, 1968 Decided July 30, 1968.)

Docket No. 32036

UNITED STATES OF AMERICA,

Appellee,

v.

CHARLES CACI, also known as BOBBY MILANO, STEPHEN A. CINO, PASQUALE A. NATARELLI, also known as PAT NATARELLI, FREDERICO G. RANDACCIO and LOUIS SORGI,

Defendants-Appellants.

Before:

Moore and Hays, Circuit Judges, and Timbers, District Judge.*

Appeals from judgments of the United States District Court for the Western District of New York, John O. Henderson, Chief Judge, entered on a jury verdict convicting appellants of conspiring to commit a robbery which would affect commerce in violation of 18 U. S. C. § 1951 and conspiring to transport stolen goods in interstate commerce in violation of 18 U. S. C. §§ 371 and 2314.

Affirmed.

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* Of the District Court for the District of Connecticut, sitting by designation.

Paul Ivan Birzon, Buffalo, New York, for Appellant Caci.

Peter L. Parrino, Buffalo, New York, for Appellant Cino.

Salten Rodenberg, Buffalo, New York, for Appellant Natarelli.

Frank G. Raichle, Buffalo, New York (Herald Price Fahringer, Buffalo, New York, on the brief), for Appellant Randaccio.

Joseph P. Runfola, Buffalo, New York, for Appellant Sorgi.

Andrew F. Phelan, Assistant United States Attorney (Thomas A. Kennelly, Acting United States Attorney for the Western District of New York, Thomas H. Henderson, Jr., and Gary L. Gardner, Attorneys, Department of Justice, on the brief), for Appellee.

HAYS, Circuit Judge:

Appellants Charles Caci, Stephen A Cino, Pasquale A. Natarelli, Frederico G. Randaccio and Louis Sorgi, were convicted, upon a trial by jury, of conspiring to commit a robbery which would affect commerce in violation of 18 U. S. C. § 1951 and conspiring to transport stolen goods in interstate commerce in violation of 18 U. S. C. §§ 371 and 2314. We have considered the many assignments of error which have been advanced by appellants and have found no ground for reversal. The judgments of conviction are affirmed.

The indictment charged in the first count that appellants conspired to rob an armored car messenger at a Los Angeles hotel in violation of 18 U. S. C. § 1951 and in the second count that appellants conspired in violation of 18 U. S. C. § 371 to transport in interstate commerce proceeds from the sale of jewelry which they planned to steal from a wealthy

guest at the hotel. Neither of the planned robberies was executed because the guest did not come to the hotel as expected. But for the decision of Pascal Calabrese, a co-conspirator, to "cooperate" while awaiting sentence on another charge, appellants' plans probably would never have come to the attention of law enforcement officials.

Calabrese, the chief government witness at trial, testified in great detail to the following. On December 29, 1964 Calabrese robbed the Buffalo City Hall of a substantial amount of money and immediately went into hiding. A few days later Stephen Cino contacted him at a Buffalo motel and told him that "Pat" [Natarelli] and "Freddie" [Randaccio] wished to see him. A meeting was arranged for the following evening, February 5, at Natarelli's house. When Calabrese arrived at the house he found Cino and Natarelli already there. They told him that they had "a couple of good scores" for him out of town. About a half hour later Randaccio arrived, and Natarelli and Randaccio explained their plans in detail.

Calabrese was to go to Los Angeles where he would be met by Charles Caci, an entertainer who used the stage name of Bobby Milano. A couple of days later Cino would join them. Caci would introduce Calabrese to Louis Sorgi, who was in charge of security at the Beverly Hilton Hotel. Calabrese would commit two robberies at the hotel. He would rob Mrs. Walker McCune, a frequent guest at the hotel, of her jewelry which was reputed to be worth $400,000. Then he would rob the armored car messenger who visited the hotel to pick up the daily receipts. The jewelry would be taken by Cino to his uncle in San Francisco, who would "fence" it, and the proceeds would be returned to Buffalo.

It was agreed that Calabrese would have some friends drive him to Pittsburgh where he would get a flight to Los Angeles. At the conclusion of the meeting Natarelli and Randaccio gave Calabrese several hundred dollars for expenses.

When Calabrese arrived at the airport in Los Angeles, Caci was there to meet him. While driving from the airport to Caci's apartment they passed the Beverly Hilton, which Caci identified as the site of the "scores." Caci obtained an apartment for Calabrese in the building in which he lived. A few days later, on February 10, Cino arrived. On that evening Caci, Cino and Calabrese went to Sorgi's home where they discussed plans for the robberies. The next day Sorgi took Calabrese on a tour of the Beverly Hilton. They visited the suite usually occupied by Mrs. McCune and made a careful study of the tunnel used by the armored car messenger. Calabrese then left the hotel with Caci and Cino and went over the planned escape route. When they reached Calabrese's apartment, Calabrese commented that it was amazing that Sorgi had the keys to the entire hotel. Caci displayed a key that he said would open all the doors Sorgi had opened at the hotel.

Mrs. McCune was expected to arrive at the hotel on the following day, but she did not. For the next several days Caci telephoned Sorgi frequently to determine whether Mrs. McCune had come. On February 17 Cino received a telephone call from Buffalo and told Calabrese that his, Calabrese's, connection with the City Hall robbery was known to the police and that he, Cino, had been instructed to return to Buffalo lest he be found with Calabrese. Cino then left for Buffalo. Five days after Calabrese surrendered to the authorities in Buffalo.

Calabrese's testimony, only the highlights of which have been summarized here, was corroborated in many details by evidence as to hotel reservations, room rentals, and the like. Evidence that Beverly Hilton passkeys had been found in Caci's possession when he was arrested on another charge provided important support for Calabrese's story.

The government introduced evidence to show that the robbery of the messenger from Armored Transport, Inc. of the pouch containing cash and checks for delivery to the United California Bank would have affected commerce. Hotel records for February, 1965 revealed that fifty-nine percent of the checks cashed at the hotel were drawn on out of state banks. During the same period 1,150 American Express Travelers Checks were cashed at the hotel. Other evidence indicated that both the bank checks and the travelers checks moved in interstate commerce in the course of collection procedures.

1. Construction of Hobbs Act

Appellants claim that the first count of the indictment should have been dismissed because the Hobbs Act, 18 U. S. C. § 1951, was not intended to cover the kind of robbery they were accused of plotting. Cino contends that Section 1951 applies only to cases of extortion, although Caci is willing to concede that it might apply to "highway" robbery as well. In light of the clear wording of the statute outlawing "robbery or extortion"[1] which affects

[1] 18 U. S. C. § 1951 (1964):
"Interference with commerce by threats or violence.
(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(Footnote continued on following page)

commerce, it is not surprising that appellants spend little time on analysis of the statutory language and place primary reliance on the legislative history. However, as we recently have had occasion to observe. "The proper function of legislative history is to solve and not to create an ambiguity." *United States v. Blasius,* Dkt. No. 32117 (2d Cir. July 8, 1968), slip op. at p. 2992 (citations omitted).

But, in any case, the legislative history does not support appellants' position. The Hobbs Act is the successor to the Anti-Racketeering Act of 1934. Section 2(a) of the 1934 Act in substance made it unlawful to obtain or attempt to obtain money or property by the use of force or threat of force in connection with any act affecting interstate commerce. Specifically excepted from the operation of the section was "the payment of wages by a bona-fide employer to a bona-fide employee." In *United States v. Local 807, Teamsters Union,* 315 U. S. 521 (1942), the Supreme Court read the exception very broadly to include the exaction from out of state truckers by means of threats of violence of payments equivalent to union wages, when the truckers declined to employ members of the local union to drive their trucks on that portion of their routes occurring within the local's territory. The Hobbs Act was passed for the purpose of overruling this

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(Footnote continued from preceding page)

(b) As used in this section—

(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

"

This definition of robbery was taken from the definition in the New York State statutes. See 91 Cong. Rec. 11843 (1945) (remarks of Rep. Michener); 91 Cong. Rec. 11906 (1945) (remarks of Rep. Robsion).

case. See H. R. Rep. No. 238, 79th Cong., 2d Sess. (1945), reprinted in U. S. Code Congressional Service pp. 1360-70 (1964). Thus, appellants are undoubtedly correct that the motive of Congress in enacting this legislation was to curb the kind of labor racketeering to which appellants would limit the reach of the statute.

However, the legislative history clearly indicates that Congress deliberately enacted a broad statute designed to apply to *all* robbery and extortion which affected commerce. The Hobbs Act was opposed by many who viewed it as specifically intended to hamper the ligitimate activities of organized labor. See, *e.g.*, 91 Cong. Rec. 11848 (1945) (remarks of Rep. Lane); 91 Cong. Rec. 11901 (1945) (remarks of Rep. Celler). In response, supporters of the measure were able to point out that its prohibitions were applicable to all individuals and groups, see, *e.g.*, 91 Cong. Rec. 11844 (1945) (remarks of Reps. Robsion and Michener); 91 Cong. Rec. 11904 (1945) (remarks of Rep. Gwynne); 91 Cong. Rec. 11905 (1945) (remarks of Rep. Robsion), that the activities proscribed—robbery and extortion—traditionally were regarded as criminal under state law, see, *e.g.*, 91 Cong. Rec. 11910 (1945) (remarks of Reps. Springer and Robsion), and that the borrowing of state law definitions in the statute provided assurance that the terms robbery and extortion would not be extented beyond their established meanings, see, *e.g.*, 91 Cong. Rec. 11900 (1945) (remarks of Reps. Hancock and Hobbs). Throughout the debates, advocates of the Hobbs bill sought to characterize it as a traditional criminal statute neutral in its application. So interpreted, the Hobbs Act plainly covers the theft contemplated by appellants.

In *United States v. De Sisto*, 329 F. 2d 929 (2d Cir.), cert. denied, 377 U. S. 979 (1964), we affirmed the conviction

under the Hobbs Act of a defendant guilty of a crime similar to that planned by appellants. De Sisto was accused of hijacking a truck loaded with silk from Japan by means of threats of violence addressed to the driver. No elements of labor racketeering or extortion were in any way present.

Randaccio also argues that the Hobbs Act is inapplicable because checks in the possession of the armored car messenger would not yet have been moving in interstate commerce. This argument is without merit. In the first place, the language in the Act relating to interstate commerce is extremely broad, "manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone v. United States,* 361 U. S. 212, 215 (1960). It is sufficient under the Act that the proposed robbery would "affect" commerce. Furthermore, it is clear that the checks would have begun their journey in interstate commerce at least as soon as they were delivered by the hotel to the employee of Armored Transport, Inc., operator of an independent messenger service. See *United States v. Sherman,* 171 F. 2d 619, 622-23 (2d Cir. 1948), cert. denied *sub nom. Grimaldi v. United States,* 337 U. S. 931 (1949); *United States v. Fox,* 126 F. 2d 237 (2d Cir. 1942).

2. Accomplice Testimony

Appellant Cino attacks the sufficiency of the evidence, apparently on the ground that the uncorroborated testimony of an accomplice is insufficient to support a verdict. Although Calabrese's testimony was a crucial importance, it did not stand alone; as noted above, it was corroborated in several respects. Moreover, even if his testimony were

not corroborated, it would be sufficient to support the conviction. See *Caminetti v. United States,* 242 U. S. 470, 495 (1917); *United States v. Agueci,* 310 F. 2d 817, 833 (2d Cir. 1962), cert. denied, 372 U. S. 959 (1963).

3. Effect on Interstate Commerce

Appellant Natarelli contends that the proof with respect to effect on interstate commerce was insufficient because it was limited to February, 1965 while the robbery of the messenger was not definitely scheduled for that month. However, the evidence clearly establishes that appellants intended to execute this robbery in February. The messenger was to be robbed shortly after the theft of Mrs. McCune's jewelry; Mrs. McCune was to be robbed shortly after she arrived at the hotel. And Mrs. McCune was expected to arrive on or before February 12.

4. Knowledge of Transportation in Interstate Commerce

Appellant Caci argues that there was no evidence from which the jury could conclude that he knew that the proceeds of the jewel theft were to be transported in interstate commerce. We find ample evidence from which the jury could draw this inference. Caci was intimately involved in the preparations for the theft and this fact alone provides sufficient basis for inferring that he knew how the proceeds would be disposed of. Caci knew that Randaccio and Natarelli were directing the operation from Buffalo; he must have known that they would receive their share in Buffalo.

5. Charge on Defense of Alibi

Randaccio claims that the trial court erred in refusing his request for a charge as to the burden of proof on his

alibi defense. We hold that, in the circumstances of this case, the failure to give the charge requested did not constitute reversible error.

The basis of the alibi defense was provided by information in government electronic surveillance logs as to Randaccio's whereabouts on the night of the alleged meeting at Natarelli's house. This information was transmitted to the jury in the form of the following stipulation:

"The government and the defendant, Frederico Randaccio stipulate that on February 5, 1965, a witness, who is not being called to testify, was in a position to overhear, but not see, certain activities in an apartment in the City of Buffalo. That apartment, occupied by a person who is not a defendant in this case, is located approximately nine-tenths of a mile from 60 Manchester Place [Natarelli's address]. At 7:50 P. M. on that evening, Frederico Randaccio was heard arriving at the apartment and talking to the occupant of that apartment. The TV, which had been turned on, was then turned up louder. Continuous loud TV ensued for the balance of the evening, during which no other sound, movement or conversation was heard indicating whether Frederico Randaccio remained or left the premises." There was also evidence that Randaccio suffered from a hearing defect the victims of which frequently turn up the volume when watching television.

Trial counsel for Randaccio sought an instruction indicating in substance that if the alibi proof when considered with the other evidence raised a reasonable doubt as to his guilt, Randaccio would be entitled to an acquittal. Apparently it was thought that such an instruction would prevent the jury from erroneously believing that the burden of establishing the alibi defense was on the de-

fendant. However, both the manner in which this request was made and the manner of objecting to its denial gave the trial court little opportunity for the reflection and deliberation which compliance with the provisions of Fed. R. Crim. P. 30 is designed to provide.

Rule 30 requires that written requests to charge be filed at the close of the evidence "or at such earlier time during the trial as the court reasonably directs." In accordance with the trial court's instructions, counsel submitted requests in advance, including twenty-five requests on Randaccio's behalf. The trial judge informed counsel of his disposition of the requests four days before he was to charge. At that time trial counsel for Randaccio indicated that he was preparing supplemental requests which would be ready later that day. The judge stated that he wished to have them as soon as possible. The additional requests were not presented until fifteen minutes before the judge began delivering his charge. At that late hour, see *United States v. Olweiss*, 138 F. 2d 798, 800 (2d Cir. 1943), motion for leave to file a petition for certiorari *nunc pro tunc* denied, 321 U. S. 744 (1944), counsel submitted four additional requests, of which the alibi request was the second.

Having given the court only the barest opportunity to consider the alibi request in advance, counsel compounded the delict by inadequately objecting to the failure to charge as requested. Rule 30 requires that counsel state "distinctly the matter to which he objects and the grounds of his objection." At the conclusion of his charge the trial judge gave the reasons for his refusal to charge the additional requests and stated, "You have, of course, an exception." Counsel presented detailed objections to other portions of the charge, but made no mention of the alibi request.

Ordinarily the failure to give an instruction on alibi defense will not be considered absent a proper request.

See *United States v. Tramaglino,* 197 F. 2d 928, 932 (2d Cir.), cert. denied, 344 U. S. 864 (1952); *Goldsby v. United States,* 160 U. S. 70, 77 (1895). Assuming that in some circumstances the failure to give such a charge might constitute "plain error," see Fed. R. Crim. P. 52 (a), this is hardly such a case. The alibi offered was far from compelling. Calabrese's testimony indicated that Randaccio arrived at Natarelli's place at about 8:30 or 9:00 p. m. There is nothing in Calabrese's story which is inconsistent with Randaccio's being nine-tenths of a mile away at 7:50. Under these circumstances, the court's comprehensive charge on reasonable doubt, which included the statement that the burden of proof "rests with the Government at all times" and "never shifts to a defendant," was adequate.

6. Evidentiary Rulings

Caci contends that the admission of evidence to show that certain of his recent checks had been returned for insufficient funds was prejudicial as showing the commission of other crimes. We hold that the evidence was admissible to rebut evidence of Caci's good character. Although no character witnesses were presented, Caci's counsel cross examined Calabrese about Caci's appearances on popular television shows and introduced a brochure which included a photograph of Caci in the company of a well-known entertainer. The bad check evidence also tended to show that Caci lacked funds and thus had a motive to participate in the planned thefts. This has particular significance in view of the testimony from which the jury might have gathered that Caci was a highly paid entertainer. Finally, it is difficult to see how this evidence could have seriously prejudiced Caci, particularly since the evidence also showed that the checks subsequently had been redeposited and paid.

Caci also argues that the Beverly Hilton passkeys found in his motel room were seized in violation of his fourth amendment rights and should not have been admitted into evidence. His argument seems to be that the trial court erred in crediting the government's witnesses who stated that Caci voluntarily admitted the police officers to the room rather than crediting Caci's witnesses who testified that the officers broke down the door. Of course we are in no position to contradict the trial judge's determinations as to the credibility of witnesses whom we have not seen. See *United States v. Vita,* 294 F. 2d 524, 528 (2d Cir. 1961), cert. denied, 369 U. S. 823 (1962).

It is also claimed that the officers learned of the keys through interception in violation of 18 U. S. C. § 605 of a telephone conversation between one Fitzgerald and appellant Sorgi. Since Fitzgerald, the caller, gave the officers permission to listen in on the conversation, there was no violation of Section 605. See *Rathbun v. United States,* 355 U. S. 107 (1957).

Natarelli claims that evidence that the robbery would obstruct the interstate movement of checks was inadmissible under *Stirone v. United States,* 361 U. S. 212 (1960), because the indictment charged only that the robbery would obstruct the interstate movement of money. The claim is frivolous.

7. Jury Selection

Randaccio objects to several features of the jury selection process in the Western District of New York. About one-half of the names for the federal jury box are obtained from state jury lists. Concerning the prospective jurors so obtained, Randaccio has two objections: (1) the primary sources used by the state jury selectors are voter regis-

tration lists, so that non-voters are under-represented, and (2) New York law permits women to claim exemption from jury service, so that women are under-represented. Neither of these objections is substantial. It is well established that the use of voter registration lists as the source of names of prospective jurors is not unlawful because it results in the exclusion of non-voters. See, *e.g., United States v. Kelly,* 349 F. 2d 720, 778 (2d Cir. 1965), cert. denied, 384 U. S. 947 (1966); *United States v. Agueci,* 310 F. 2d 817, 833-34 (2d Cir. 1962), cert. denied, 372 U. S. 959 (1963). Indeed, voter registration lists are made the primary source of jurors in the new Jury Selection and Service Act of 1968, 18 U. S. C. A. §§ 1861-71 (Supp. July, 1968). As to the representation of women, it is significant that three women served on the jury which convicted appellants. Since only one-half of the federal jurors are taken from the state lists and since women are represented in substantial (albeit unequal) numbers on the state lists, the under-representation of women on the federal juries is minimal. We note also that the constitutionality of the New York statute permitting women to claim exemption has been sustained. *Fay v. New York,* 332 U. S. 261, 277-78 (1947). See also *Hoyt v. Florida,* 368 U. S. 57 (1961).

One-half of the names in the federal jury box in the Western District are selected by a federal jury commissioner using a variety of methods, including the "key-man" system. As to these, Randaccio complains that the commissioner has no authority to reject jurors as unqualified except on the grounds set forth in 28 U. S. C. § 1861 (1964). The jury commissioner testified that he did not place in the jury box the names of persons whose answers to a questionnaire indicated that they were of low mentality. It is arguable that Section 1861(3) specifically authorizes the commissioner to reject such persons as "incapable, by

reason of mental . . . infirmities to render efficient jury service." In any event, it is settled in this Circuit that a jury commissioner has discretion under 28 U. S. C. § 1864 (1964) to reject prospective jurors as not "qualified" for reasons other than those listed in Section 1861. See *United States v. Flynn,* 216 F. 2d 354, 386-88 (2d Cir. 1954), cert. denied, 348 U. S. 909 (1955).

8. Motion for Severance

Caci's motion under Fed. R. Crim. P. 14 for a severance in order that he might have the benefit of Sorgi's testimony in his behalf and his alternative motion for permission to inform the jury that he had attempted to call Sorgi as a witness were both properly denied. As to the former, "The argument is unrealistic. There is no reason to think that a co-defendant would be any more willing to waive his constitutional privilege against self-incrimination when called as a witness at a separate trial than he would be willing not to insist upon his privilege as a defendant not to take the stand." *Gorin v. United States,* 313 F. 2d 641, 645-46 (1st Cir.), cert. denied, 374 U. S. 829 (1963). And had counsel for Caci been permitted to comment on Sorgi's refusal to take the stand, Sorgi's rights under the fifth amendment would have been violated. See, *e.g., United States v. Echeles,* 352 F. 2d 892, 898 (7th Cir., 1965); *DeLuna v. United States,* 308 F. 2d 140 (5th Cir. 1962), petition for rehearing denied, 324 F. 2d 375 (1963). We are aware that these cases also appear to hold that the inability of a defendant to comment on a co-defendant's refusal to take the stand in a joint trial is sufficient to require a severance. Subsequent cases, however, have read *DeLuna* and *Echeles* narrowly, confining their application to cases in which a defendant can show "real prejudice" if he is not permitted to comment on the silence of a co-defendant.

United States v. Kahn, 381 F. 2d 824, 840 (7th Cir.), cert. denied, 389 U. S. 1015 (1957). See *Smith v. United States*, 385 F. 2d 34, 37-38 (5th Cir. 1967); *Kolod v. United States*, 371 F. 2d 983, 990-91 (10th Cir. 1967), vacated on other grounds, 390 U. S. 136 (1968); *Hayes v. United States*, 329 F. 2d 209, 221-22 (8th Cir.), cert. denied sub nom. *Bennett v. United States*, 377 U. S. 980 (1964). See also *United States v. McKinney*, 379 F. 2d 259, 264-65 (6th Cir. 1967). No such prejudice has been shown here.

9. Other points

The remaining contentions do not require extended comment.

a. Natarelli's claim that the second count should have been dismissed because one cannot be guilty of conspiring to transport stolen goods "knowing them to have been stolen" under 18 U. S. C. § 2314 until the goods have in fact been stolen is without merit. *Cf. Williamson v. United States*, 207 U. S. 425, 446-47 (1908).

b. Since no objection was taken below we do not consider Cino's argument that he was deprived of his constitutional right to be present at every stage of his trial by the holding of numerous conferences in his absence in the judge's chambers. *United States v. Indiviglio*, 352 F. 2d 276 (2d Cir. 1965) (*en banc*), cert. denied, 383 U. S. 907 (1966).

c. Caci contends that the district court erred in refusing to recall the jurors seven days after the verdict to learn whether any of them had heard and had been influenced by radio broadcasts on the evening prior to and on the morning of the charge referring to three of the defendants as having been linked to the Cosa Nostra. In view of the limited character of the publicity and the repeated and

detailed admonitions by the court to the jury to refrain from listening to the radio, the court did not abuse its discretion in refusing to recall the jury. *Cf. United States v. Hoffa,* 367 F. 2d 698, 715 (7th Cir. 1966), vacated on other grounds, 387 U. S. 231 (1967).

d. Finally, appellants raise three objections to the jury charge, none of which we find to have merit.

The court charged with respect to accomplice testimony as follows: "such testimony is to be given close and searching scrutiny and is to be received with caution and weighed with great care. You should not convict a defendant on the unsupported testimony of an accomplice unless you believe the unsupported testimony beyond all reasonable doubt." Far from being inadequate, this charge was more favorable to appellants than was required. See *United States v. Mattio,* 388 F. 2d 368 (2d Cir. 1968).

The court did not err in instructing the jury that a change in the form of the stolen property was not fatal in a prosecution for interstate transportation under 18 U. S. C. § 2314. See *United States v. Walker,* 176 F. 2d 564, 566 (2d Cir.), cert. denied, 338 U. S. 891 (1949).

The instruction that the defendants need not have intended to affect commerce in order to be guilty was entirely correct. See *Nick v. United States,* 122 F. 2d 660, 673 (8th Cir.), cert. denied, 314 U. S. 687 (1941), cited with approval in *United States v. Varlack,* 225 F. 2d 665, 672 (2d Cir. 1955). See also *United States v. Pranno,* 385 F. 2d 387, 380-90 (7th Cir. 1967), cert. denied, 390 U. S. 944 (1968).

Affirmed.